

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORRI GIRARD-QUICK,)	
)	No. CV-08-3004-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND DIRECTING ENTRY OF
MICHAEL J. ASTRUE,)	JUDGMENT FOR DEFENDANT
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 14, 17.) The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) Attorney D. James Tree represents Lorri Girard-Quick (Plaintiff); Special Assistant United States Attorney David Burdett represents the Commissioner of Social Security (Defendant). After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment in favor of Defendant.

Plaintiff filed for disability insurance benefits (DIB) under Title II of the Social Security Act on July 22, 2004. (Tr. 55.) She alleged disability due to carpal tunnel syndrome of the right hand and right shoulder and arm injury related problems, with an onset date April 6, 2001. (Tr. 120, 121.) Following a denial of

1 benefits and reconsideration, a hearing was held before
2 Administrative Law Judge (ALJ) Paul Gaughen. (Tr. 46-55, 452-76.)
3 The ALJ denied benefits; review was denied by the Appeals Council.
4 (Tr. 12-23, 4-6.) This appeal followed. Jurisdiction is
5 appropriate pursuant to 42 U.S.C. § 405(g).

6 **STATEMENT OF FACTS**

7 The facts of the case are detailed in the transcript of
8 proceedings (Tr.) and are briefly summarized here. Plaintiff was 47
9 at the time of the hearing, with a ninth-grade education. (Tr.
10 457.) She was single and had one child. (Tr. 300.) She had work
11 experience as a house cleaner and fruit sorter. She is right-hand
12 dominant. Her right shoulder was injured on the job as a fruit
13 packer, and the injury was aggravated while she was working as a
14 housekeeper, causing pain in her right shoulder, back, arm and hand.
15 (Tr. 458.) She had two surgeries on her shoulder after it was
16 injured, and a successful carpal tunnel release in 2002. (Tr. 193,
17 212.) She testified she continued to have problems with her
18 shoulder and hands, including pain, restricted range of motion and
19 weakened grip that caused her to drop things. She testified her
20 left hand was beginning to give her problems also. (Tr. 460-61.)
21 She stated she had problems sleeping and no energy four or five days
22 per month. (Tr. 462.) She testified she cooked and cleaned the
23 house, but these activities took her longer than they did before her
24 injuries. (Tr. 463.)

25 **ADMINISTRATIVE DECISION**

26 The ALJ found Plaintiff's date of last insured for DIB was June
27 30, 2005. He determined she had not engaged in substantial gainful
28 activity since the alleged onset date through the date of last

1 insured. (Tr. 17.) At steps two and three, the ALJ found Plaintiff
2 had the severe impairments of "adhesive capsulitis of the right
3 shoulder post surgery and right side carpal tunnel syndrome by
4 history," but these impairments did not meet the requirements of 20
5 C.F.R. Part 404, Subp. P, Appendix 1 (Listings). (Tr. 17-18.) At
6 step four, ALJ Gaughen made the following residual functional
7 capacity (RFC) finding:

8 [T]hrough the date last insured, the claimant has the
9 residual functional capacity to perform light work, which
10 involved occasional lifting less than 20 pounds with her
11 right upper extremity, frequent lifting or carrying of 10
12 pounds with her right upper extremity, sitting for 6 hours
13 and standing/walking for 6 hours in an 8 hour workday and
having limited use of her right upper extremity for
repetitive grasping, holding and turning objects (i.e.,
gross manipulation) and reaching in all directions. Her
grip is intact with diminished strength. Her left upper
extremity is unrestricted.

14 (Tr. 18.) Based on the record and testimony from a vocational
15 expert (VE), the ALJ determined Plaintiff was unable to perform her
16 past relevant work. (Tr. 22.) At step five, the ALJ considered VE
17 testimony and record evidence and concluded Plaintiff could perform
18 other jobs in the national economy, such as charge account clerk
19 and call-out operator and, therefore, was not "disabled" as defined
20 by the Social Security Act. (Tr. 22-23.)

21 ISSUES

22 The question presented is whether there was substantial
23 evidence to support the ALJ's decision denying benefits and, if so,
24 whether that decision was based on proper legal standards.
25 Plaintiff asserts the ALJ erred when he (1) improperly rejected
26 Plaintiff's pain testimony; (2) failed to fully develop the record;
27 and (3) failed to meet the Commissioner's burden at step five. (Ct.
28 Rec. 15 at 8.)

1 In evaluating whether a claimant suffers from a
 2 disability, an ALJ must apply a five-step sequential
 3 inquiry addressing both components of the definition,
 4 until a question is answered affirmatively or negatively
 5 in such a way that an ultimate determination can be made.
 6 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 7 claimant bears the burden of proving that [s]he is
 8 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 9 1999). This requires the presentation of "complete and
 10 detailed objective medical reports of h[is] condition from
 11 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 12 404.1512(a)-(b), 404.1513(d)).

8 DISCUSSION

9 A. Credibility

10 The ALJ summarized Plaintiff's testimony and found "claimant's
 11 statements concerning the intensity, persistence and limiting
 12 effects of these symptoms are not entirely credible." (Tr. 20.)
 13 Plaintiff contends the ALJ's reasons for discounting her testimony
 14 are neither specific nor legally sufficient. She argues her pain
 15 testimony should be credited and an immediate award of benefits
 16 should be ordered. (Ct. Rec. 15 at 11-14, 18-19.)

17 Credibility is a factor considered in the evaluation of medical
 18 evidence when there is inconsistency between a diagnosed condition
 19 and a claimant's subjective complaints. *Webb v. Barnhart*, 433 F.3d
 20 683, 688 (9th Cir. 2005).

21 An ALJ cannot be required to believe every allegation of
 22 disabling pain, or else disability benefits would be
 23 available for the asking, a result plainly contrary to 42
 24 U.S.C. § 423(d)(5)(A This holds true even where
 25 the claimant introduces medical evidence showing that he
 26 has an ailment reasonably expected to produce some pain;
 27 many medical conditions produce pain not severe enough to
 28 preclude gainful employment.

26 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). As explained by
 27 the Commissioner in his policy Ruling, the ALJ need not totally
 28 reject a claimant's statements; he may find the claimant's

1 statements about pain to be credible to a certain degree, but
2 discount statements based on his interpretation of evidence in the
3 record as a whole. *Social Security Ruling (SSR)* 96-7p.

4 For example, an adjudicator may find credible an
5 individual's statement that the abilities to lift and
6 carry are affected by symptoms, but find only partially
7 credible the individual's statements as to the extent of
the functional limitations or restrictions due to
symptoms; i.e., that the individual's abilities to lift
and carry are compromised, but not to the degree alleged.

8 *Id.*

9 The ALJ must engage in a two-step analysis in deciding whether
10 to admit a claimant's subjective symptom testimony. *Smolen v.*
11 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,
12 the claimant must produce objective medical evidence of an
13 underlying "impairment," and must show that the impairment, or a
14 combination of impairments, could reasonably be expected to produce
15 pain or other symptoms. *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th
16 Cir. 1986). Once the *Cotton* test is met, the ALJ must evaluate the
17 credibility of the claimant. *Smolen*, 80 F.3d at 1281-82. If there
18 is no affirmative evidence of malingering, the ALJ must provide
19 "clear and convincing" reasons for rejecting Plaintiff's pain and/or
20 symptom testimony. *Rollins v. Massanari*, 261 F.3d 853, 858 (9th Cir.
21 2001); *Smolen*, 80 F.3d at 1283-84. The ALJ may consider the
22 following factors when weighing the claimant's credibility:
23 "[claimant's] reputation for truthfulness; inconsistencies either in
24 [claimant's] testimony or between [his/her] testimony and [his/her]
25 conduct; [claimant's] daily activities; [his/her] work record; and
26 testimony from physicians and third parties concerning the nature,
27 severity, and effect of the symptoms of which [claimant] complains."
28 *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If

1 the ALJ's credibility finding is supported by substantial evidence
2 in the record, the court may not engage in second-guessing. See
3 *Morgan*, 169 F.3d at 600.

4 Plaintiff appears to argue the ALJ did not meet the second
5 prong of the *Cotton* test, and found only that her subjective
6 complaints were not supported by objective evidence. This argument
7 is unpersuasive. After summarizing and interpreting the medical
8 evidence, the ALJ specifically identified Plaintiff's allegations
9 that she could not lift more than 40 pounds,¹ she drops things with
10 her right hand (indicating poor grip), it takes longer to do things
11 like puzzles and tasks, her pain caused her to lie down at
12 unpredictable times on bad days, and she had bad days several times
13 during the week. (Tr. 20.) He then found she met the first prong
14 of the *Cotton* test (her medically established impairments could
15 reasonably cause the alleged symptoms), but her statements were "not
16 entirely credible." To support this finding, he explained which
17 evidence undermined her testimony.

18 Specifically, he cited record evidence of her daily activities
19 (mowing the lawn, household chores, walking a mile, painting,
20 driving, socializing) and found these activities "were not
21 consistent with [her] statements." (*Id.*) This is a legally
22 sufficient reason for discounting credibility and is supported by
23 her statements to examining physician Fred Price, D.O. (Tr. 302.)
24

25 ¹ At the hearing she testified, "I used to be able to lift
26 quite a bit of weight, and I can't lift even 40 pounds of dog food
27 out of the trunk of the car anymore." She also stated some days it
28 was difficult to lift a gallon of milk. (Tr. 459.)

1 The ALJ gave additional reasons for not fully crediting her
2 statements. The reasons included personal observations of her
3 treating physicians: her treating physicians did not rule out all
4 work activities; her treating orthopedic surgeon, Thomas Kennedy,
5 M.D.,² opined she could lift 25 pounds and should be able to do light
6 work; Dr. Kennedy observed she had a "disability mind set"; in 2004,
7 her treating physician, Wallace Donaldson, M.D., indicated she
8 possibly could do cashier work; and examining orthopedic specialist
9 Alfred Blue, M.D., opined Plaintiff could work with shoulder
10 limitations. Dr. Blue also observed Plaintiff stated she could not
11 work, suggesting a disability mind set and secondary gain issues.
12 (Tr. 20, 193, 195-99, 319-21, 341, 351, 400.) These documented
13 observations of examining and treating physicians are legally
14 sufficient, "clear and convincing" reasons to discount Plaintiff's
15 pain testimony. *Light*, 119 F.3d at 792. The ALJ's credibility
16 determination was based on more than a lack of objective medical
17 evidence and is supported by substantial evidence.

18 **B. ALJ's Duty to Develop the Record**

19 Plaintiff asserts that remand is necessary to obtain additional
20 testing as recommended by her examining and treating physicians.
21 (Ct. Rec. 15 at 14.) Treatment notes from April 2002 by her
22 treating orthopedic surgeon, Dr. Kennedy, indicate a MRI showed AC
23 joint arthrosis and impingement syndrome of the right shoulder and
24 possible rotator cuff tear. Surgery was scheduled for shoulder
25

26 ² The opinions of medical specialists about medical issues
27 related to their area of speciality are given more weight than
28 physicians who are not specialists. 20 C.F.R. § 404.1527(d)(5).

1 decompression and, if necessary, repair of the rotator cuff tear.
2 (Tr. 17, 212-16.) In January 2003, a second shoulder arthroscopy
3 was performed to relieve adhesive capsulitis in the right shoulder.
4 (Tr. 211.) In November 2003, Plaintiff saw Dr. Kennedy for a
5 follow up of the second surgery. (Tr. 193.) Dr. Kennedy noted her
6 shoulder surgery was well-healed, but Plaintiff continued to
7 complain of pain in her shoulder and newly complained of recurrent
8 hand numbness. (Tr. 193.) Dr. Kennedy reported Plaintiff's carpal
9 tunnel release in August 2002 had had excellent results, with a
10 complete resolution of symptoms. He recommended further physical
11 therapy and expressed concern about secondary gain issues around her
12 return to work. However, because of Plaintiff's new symptom
13 complaints, he recommended an evaluation by a hand specialist. (Tr.
14 17, 193-94.)

15 In January 2004, Dr. Donaldson referred Plaintiff to
16 neurologist Peter Gilmore, M.D., for an evaluation of her right hand
17 numbness. (Tr. 222.) Dr. Gilmore noted Plaintiff had had a MRI
18 scan of her shoulder in 2002, followed by two separate surgeries.
19 Nerve conduction tests performed by Dr. Gilmore in January 2004 were
20 normal, with no evidence of carpal tunnel syndrome on either side.
21 (Tr. 220-21.) Dr. Gilmore recommended a MRI scan of the cervical
22 spine, to be ordered by Dr. Donaldson. (Tr. 219, 317.) In July
23 2004, Dr. Donaldson reported there was continued delay in getting
24 authorization for the recommended MRI. (Tr. 226.) Plaintiff argues
25 the Commissioner had a duty to order an MRI because it was
26 recommended by Dr. Gilman and Dr. Donaldson (upon Dr. Gilman's
27 recommendation).

28 In Social Security proceedings, the burden of proof is on the

1 claimant to prove the existence of a severe impairment by providing
2 medical evidence consisting of signs, symptoms, and laboratory
3 findings; the claimant's own statement of symptoms alone will not
4 suffice. 20 C.F.R. § 404.1508. As a threshold to establishing an
5 impairment, it is the claimant's responsibility to produce
6 sufficient objective medical evidence of underlying impairment to
7 show that the impairment, or a combination of impairments, "could
8 reasonably be expected to produce pain or other symptoms." *Cotton*,
9 799 F.2d 1403.

10 Once medical evidence is provided by the claimant, the
11 Regulations state the agency "will develop your complete medical
12 history for at least the 12 months preceding the month in which you
13 file your application unless there is a reason to believe that
14 development of an earlier period is necessary." 20 C.F.R.
15 § 404.1512 (d). An ALJ's duty to develop the record further is
16 triggered "only when there is ambiguous evidence or when the record
17 is inadequate for proper evaluation of evidence." *Mayes v.*
18 *Massanari*, 276 F.3d 453, 4509-60 (9th Cir. 2001) (*citing Tonapetyan*
19 *v. Halter*), 242 F.3d 1144, 1150 (9th Cir. 2001)). To further develop
20 the record, the Commissioner may order consultative examinations at
21 the agency's expense. However, the Commissioner has "broad latitude
22 in ordering a consultative examination," *Diaz v. Secretary of Health*
23 *and Human Services*, 898 F.2d 774, 778 (10th Cir. 1990). Consultative
24 exams are purchased to resolve a conflict or ambiguities "if one
25 exists." 20 C.F.R. § 404.1519a(2). There must be sufficient
26 objective evidence in the record to suggest the "existence of a
27 condition which could have a material impact on the disability
28 decision." *Hawkins v. Chater*, 113 F.3d 1162, 1167 (10th Cir. 1997.)

1 Here, there are neither ambiguities nor conflicts in the
2 medical evidence regarding Plaintiff's history and complaints of
3 carpal tunnel syndrome. Further, the record contains evidence that
4 Plaintiff was seen by specialists, as recommended by Dr. Kennedy.
5 Specifically, Plaintiff was sent to an orthopedic hand surgeon, Dr.
6 Blue, for evaluation and recommendation in May 2004, after she was
7 referred to Dr. Gilmore.³ (Tr. 314-21.) Dr. Blue reviewed the entire
8 record and personally examined Plaintiff. He found no significant
9 limitations in Plaintiff's gripping during rapid, repeat gripping
10 tests. (Tr. 319.) Contrary to Dr. Gilmore's suggestion in January
11 2004, Dr. Blue concluded no further testing was needed, stating that
12 further imaging "may find some abnormalities but the neurological
13 examinations do not show any objective evidence of a nerve root
14 compression." (Tr. 320.) Dr. Blue accepted the diagnoses of right
15 shoulder sprain and bilateral carpal tunnel syndrome, but noted
16 symptom magnification in the examination and Dr. Kennedy's concerns
17 regarding secondary gain. He concluded the right shoulder had
18 reached maximum improvement and "the carpal tunnel syndrome which
19 has been previously accepted are [sic] clinically not present nor
20 with an EMG/nerve conduction study." (Tr. 319-20.) Regarding
21 Plaintiff's ability to return to work, the hand specialist stated:

22 _____
23 ³ On independent review, it is noted that neurologist Dr.
24 Gilmore saw Plaintiff two times, once for evaluation and once for
25 nerve conduction tests. (Tr. 219-24). Therefore, he is considered
26 an examining physician, whose opinions are given less weight than
27 those of Dr. Kennedy, a treating specialist. *Lester v. Chater*, 81
28 F.3d 821, 830 (9th Cir. 1995).

1 "The restriction of returning the patient to work is the patient's
2 own conviction of disability and the patient's limited education."
3 (*Id.*) Dr. Blue also evaluated possible jobs that Plaintiff could
4 perform and, based on objective findings, opined Plaintiff could
5 perform work that did not require overhead work or complete shoulder
6 work. He also noted, "Based on [Plaintiff's] conviction she would
7 not be able to do any of the jobs." (Tr. 321.) In June 2004, Dr.
8 Blue was requested to re-evaluate the jobs based solely on objective
9 findings. (Tr. 357.) His responsive second set of job analyses
10 indicated Plaintiff was capable of performing work as a photo
11 technician, photographer, customer service representative, and
12 restaurant hostess. (Tr. 358-61.)

13 In August 2005 (after Plaintiff's period of disability
14 expired), Plaintiff was examined again by orthopedic surgeon, David
15 Whitney, M.D. (Tr. 362-70.) Plaintiff was complaining of numbness
16 and tingling in both hands and pain and stiffness in the right
17 shoulder. (Tr. 363.) After an interview and detailed review of
18 the records, Dr. Whitney conducted a complete exam. He noted lack
19 of full effort bilaterally with grip testing, no evidence of
20 impingement of the right shoulder, and normal "two-point
21 discrimination of both hands." (Tr. 368.) Based on his examination
22 and prior repeat nerve conduction tests, he found no evidence of
23 permanent partial impairment of either wrist or hand. (Tr. 369.)
24 He opined no further testing was needed. (Tr. 367-69.) He also
25 questioned the validity of right shoulder limitations demonstrated
26 by Plaintiff during the examination. (Tr. 370.)

27 The ALJ did not err in relying on the orthopedic specialists
28 consulted after Dr. Kennedy recommended Plaintiff be referred to a

1 hand specialist. It is within the Commissioner's authority to
2 determine how to resolve conflicting medical issues. Further, it
3 was reasonable for the ALJ to rely on the opinions of Drs. Kennedy
4 Blue and Whitney, all of whom were orthopedic specialists, in his
5 consideration of the evidence and final determination. The fact
6 that Dr. Gilmore suggested a MRI where nerve conduction tests
7 revealed no carpal tunnel syndrome, does not warrant more weight
8 than the opinion of Dr. Kennedy, that Plaintiff should consult with
9 a hand surgeon, and the opinions of examining orthopedic
10 specialists, that no further testing was needed to properly evaluate
11 Plaintiff's hand condition. See 20 C.F.R. § 404.1527(d)(5) (more
12 weight given to opinions of specialist about issues related to
13 his/her area of speciality).

14 The ALJ's resolution of the conflicting medical opinions
15 regarding the need for additional testing is reasonable and fully
16 supported by the record. The ALJ did not have a duty to order an
17 additional MRI.

18 **C. Step Five: Hypothetical Question**

19 At step five, the burden shifts to the Commissioner to show
20 that (1) the claimant can perform other substantial gainful
21 activity; and (2) a "significant number of jobs exist in the
22 national economy" which claimant can perform. *Kail v. Heckler*, 722
23 F.2d 1496, 1498 (9th Cir. 1984). At step five, the hypothetical posed
24 to the VE must accurately reflect the claimant's impairments.
25 *Embrey v. Bowen*, 849 F.2d 418, 423 (9th Cir. 1988); *DeLorme v.*
26 *Sullivan*, 924 F.2d 841, 850 (9th Cir. 1990). Plaintiff argues the
27 ALJ erred when he presented a hypothetical question to the VE that
28 did not include Plaintiff's need for unscheduled breaks and problems

1 carrying things without dropping them. (Ct. Rec. 15 at 18.)
2 However, an ALJ does not have to accept as true the limitations
3 propounded by a claimant's counsel if those limitations are not
4 supported by the record. *Martinez v. Heckler*, 807 F.2d 771 (9th Cir.
5 1986); see *Osenbrock v. Apfel*, 240 F.3d 1157, 1163-64 (9th Cir.
6 2001).

7 The hypothetical posed to the VE is as follows:

8 Her last grade in school was the ninth. There are no
9 mental health limitations. The individual is right
10 handed. Now you should know that sitting, standing and
11 walking, and performing basic work activities are
12 essentially unrestricted. Bending, stooping, kneeling can
13 be done at least occasionally. Use of the nondominant
14 left upper extremity is essentially unrestricted. But
15 there are restrictions post surgically on the dominant
16 right arm as follows. With that arm she could frequently
17 lift or carry no more than 10 pounds, or occasionally
18 handle on the right upper extremity no more than about 20
19 pounds. But she has limited reaching overhead and, and
20 generally in all directions with the right upper
21 extremity. And you should also assume that while range of
22 motion of the right wrist is intact, she would present at
23 work with some diminished gripping strength on the right.
24 She may even drop things from time to time with occasional
25 use of the right hand. With regard to her vision and
26 hearing, there are no restrictions. That is intact and
27 normal.

28 (Tr. 465-66.)

29 The VE testified in detail that the hypothetical individual
30 could perform two specific jobs that existed in significant numbers
31 in the national economy, and as listed in the DICTIONARY OF OCCUPATIONAL
32 TITLES (DICOT): charge account clerk and call-out operator. (Tr.
33 467.) He also testified there were other identifiable jobs, but the
34 ALJ considered these two jobs sufficient for step five purposes.
35 (*Id.*) One occupation that exists in the national economy is
36 sufficient to support a finding that a claimant is not disabled. 20
37 C.F.R. §§ 404.1566(b). During his testimony, the VE specifically

1 referenced the DICOT definitions and opined as to how the jobs were
2 typically performed. (Tr. 468-69); See *Osenbrock*, 240 F.3d at
3 1164-65; SSR 00-4p. In response to the representative's
4 questioning, the VE opined the hypothetical individual could perform
5 the call-out operator job even if it required finger and manual
6 dexterity for computer work. (Tr. 470.)

7 There is no evidence, other than Plaintiff's self-report, that
8 Plaintiff needed unscheduled rest periods and had problems carrying
9 objects with her right hand. As discussed above, the ALJ gave
10 "clear and convincing reasons" for discounting Plaintiff's
11 allegations of disabling pain and fatigue, including her need to lie
12 down at unpredictable times during the day and that she drops things
13 when carrying them on her right side. (Tr. 20.) As stated in the
14 ALJ's findings, her treating and examining physicians, including
15 orthopedic specialists, opined she could perform light work with
16 right shoulder restrictions. (*Id.*; Tr. 195, 304-05, 321, 368-95.)
17 These opinions were based on objective findings, physician
18 observations and physical exam.⁴ The record in its entirety does not
19 support additional limitations propounded by Plaintiff's
20 representative; therefore, the ALJ did not err in excluding them
21 from his hypothetical. The ALJ properly relied on VE testimony

22
23 ⁴ Plaintiff's objections to weight given Dr. Fred Price's
24 examining opinion are based on the physician's misstatement
25 regarding the number of MRI's in the record. (Ct. Rec. 15 at 15;
26 Tr. 299.) However, Dr. Price's final opinions are supported amply
27 by his thorough physical examination, range of motion testing, and
28 report and by other medical evidence in the record. (Tr. 298-309.)

1 because the hypothetical included all limitations supported by the
2 record.

3 It is well settled that the ALJ is "responsible for determining
4 credibility, resolving conflicts in medical testimony and for
5 resolving ambiguities," in these proceedings. *Richardson*, 402 U.S.
6 at 400; *Andrews*, 53 F.3d at 1039; *SSR 96-8p*. Where, as here, the
7 ALJ's determination is a rational interpretation of the evidence in
8 its entirety, the court may not substitute its judgment for that of
9 the Commissioner. *Tackett*, 180 F.3d at 1097; *Curry v. Sullivan*,
10 925, F.2d 1127, 1131 (9th Cir. 1990).

11 **CONCLUSION**

12 The ALJ's findings are supported by substantial evidence and
13 free of legal error. Accordingly,

14 **IT IS ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
16 **DENIED**.

17 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
18 **Rec. 17**) is **GRANTED**.

19 3. The District Court Executive is directed to file this
20 Order and provide a copy to counsel for Plaintiff and Defendant.
21 The file shall be **CLOSED** and judgment entered for Defendant.

22 DATED January 8, 2009.

23
24 S/ CYNTHIA IMBROGNO
25 UNITED STATES MAGISTRATE JUDGE
26
27
28